

MINUTES

INSOLVENCY LAW COMMITTEE OF THE BUSINESS LAW SECTION OF THE STATE BAR OF CALIFORNIA

December 9, 2005

The regularly scheduled meeting of the Insolvency Law Committee of the Business Law Section of the State Bar of California was held on December 9, 2005 at the Law Offices of Stutman, Treister & Glatt, P.C., Los Angeles, California. The following members attended the meeting in person (at Stutman Treister & Glatt), at a satellite site at Wendel Rosen Black & Dean in Oakland, California or by phone:

Andrew Alper
Molly Baier
Elizabeth Berke-Dreyfuss
Douglas Boven
Christopher Celentino
Ellen Friedman
Barry Glaser
Justin Harris
Eve Karasik
Michael Koch
Howard Kollitz
Douglas Kraft
David Meadows
Donna Parkinson

Paul Pascuzzi
Mark Porter
Maria Pum
William Sias
Ed Tredinnick
Colin Wied
Mary Jo Wiggins
Craig Wolfe

Russell Clementson (Ex Officio)
Rob Harris (Ex-Comm Liaison)
Sandy Lavigna (Ex Officio)
Peter Bronson (Former Chair)

The following members did not attend the meeting with advance notice: Sharon Dutton, Lisa Fenning (Committee Advisor), Malhar Pagay, Dan Schechter (Committee Advisor) and Rhonda Nelson. Gary M. Kaplan also attended the meeting as a visitor.

The Chair called the meeting to order at approximately 10:06 a.m., and noted the presence of a quorum.

1. Administrative Matters.

a. Approval of Minutes. The Minutes of the November 10, 2005 meeting were approved as amended to reflect Mary Jo was not present and to note that she is a former member of the Special Rules Committee.

b. Roster Accuracy. The Chair reminded members to make any changes of address or corrections to the Roster.

c. Meeting Schedule. The Chair also noted that the current meeting schedule for next year is included in the materials.

d. Bar Profiles set up. The Chair thanked those members who have updated or set up their bar profiles on the State Bar website but noted that not all members of the Committee have set up or updated their profiles. The Chair indicated that when members set up a profile, they notify him. He urged those members who have not yet set up their bar profile to do it soon.

2. Publications Subcommittee Report.

a. Business Law News.

(i) Colin Weid reported that he sent an e-mail for members to review with an article for the BLN based on his family law presentation expanded for business lawyers. He reported that Susan Orloff stated there would be no problem publishing the article in the BLN.

(ii) Other BLN Article Topics—Colin Weid also reported that Barry Glaser sent an e-mail asking about a supplement dealing with health care insolvency issues. Colin reported that he is hoping for at least one article per quarter in the BLN and he is hoping to do an insolvency theme volume of the BLN in 2006. Rob Harris suggested that Colin reserve an issue of the BLN so articles written will get published. Others have agreed to write articles, including Mary Jo Wiggins on changes to small business bankruptcy provisions and jurisdictional issues in April, 2006. The deadline for second quarter BLN is in January. There was a discussion about publishing the Model Real Estate Order and instructions also.

(iii) Colin also reported he is working on the chapter Chapter 11 Manual after the first of the year.

3. Legislative Subcommittee Report.

a. Conference Call with Neil Wertlieb re BLS Standing Committee Guidelines for Legislation; Deadlines for ALP. The Chair reported on the conference call with Neil Wertlieb, to provide information to the Committee on the affirmative legislative proposal (“ALP”) process. The call lasted approximately 1 hour. There were 8 members on the telephone. The chair sent a 40-page written guidelines for the ALP process via e-mail to the members. They explain what the Committee can do, the formats and timelines for ALP’s and Comments. The current deadline for submission of ALP’s to Ex-Comm is June 1, 2006. They should be sent to the Office of Government Affairs by August 1, 2006. David Meadows reported that Neil requested that a liaison be appointed from the Legislative Committee to the ILC and emphasized that Neil would like to be kept up to date. The Chair and David will be the liaisons for now. They will keep Neil informed as to legislation on which the ILC is focusing. If a particular ALP is undertaken, the Chair noted that a specific liaison would be appointed.

b. Possible ALP re CCP § 703.130 and Other California Provisions Containing Erroneous References to the Bankruptcy Code or Act. Bill Sias reported that he ran two different searches in Lexis for “Title 11” and “Title 11 of the U.S. Code” looking for specific references to the Bankruptcy Code or Act in the California Codes. He found some references to Title 11 that were plainly erroneous, such as the Calif. Food and Ag Code §58503.1, which

references § 501(c)(3) of Title 11 but refers in text to non-profit tax exempt organizations. It is clear that the drafters meant to refer to the Tax Code, Title 26. Various members suggested some additional search terms to flush out all of the incorrect references to matters connected to the Bankruptcy Code or Act. Bill Sias will follow up with additional searches and create a complete list of the erroneous references.

c. Fairness in Bankruptcy Litigation Act of 2005 (re venue): ILC comment finalized, not expected to move until January 2006. Lisa Fenning was not present. Molly Baier confirmed previous reports that nothing is happening and nothing is expected to happen until some time in 2006. Rob Harris confirmed that he also heard at the Northern District Judge's Conference that nothing is happening on this issue.

d. S. 256 (BAPCPA).

(i) Liaison to Central District of Ad Hoc Committee. Barry Glaser reported that there has not been any further review by the Ad Hoc Committee of new local forms pertaining to relief from stay and unlawful detainer.

(ii) Review of Interim Rules and Forms; Comment to (National) Advisory Committee on Bankruptcy Rules. Mary Jo Wiggins reported that the Subcommittee met telephonically and divided up and assigned sections of the rules for members to review. The Chair indicated he hoped that comments would be completed for our January 2006 meeting so they can be forwarded to Ex-Comm for approval in February or March. The Chair indicated that the ILC should coordinate with other committees that are affected by the rules and forms. He invited members to identify other committees so the comments could be circulated. The Chair noted that Neil Wertlieb stated in his conference call described earlier that Ex-Comm would be interested in knowing whether comments have been circulated to other committees to solicit additional comments. The next conference call for the Subcommittee is scheduled for December 13, 2005. The Chair noted that the reviewers will have to rely on e-mail to sharpen and refine the comments because of the timing. He asked that the reviewers not wait until January to give the ILC a first look at the comments if possible. Mary Jo Wiggins reported that she spoke with Professor Jeff Morris, a reporter for the Advisory Committee on Bankruptcy Rules, who told her it would be ideal to complete the comments by January. The Chair requested that Subcommittee members complete their comments and e-mail them to members for review over the holidays. The Chair would like to have all the comments ready to approve by the January meeting so they can be sent to Ex-Comm and forwarded to the Rules Committee by the first week of March. The Chair recognized this is an ambitious time frame but thought it could be done if ILC members review the comments over the holidays. He also noted that there are summaries of changes to the Bankruptcy Code on the Eastern District Website, how the rules are affected by the changes and holes in the rules. This might be a good resource for those members reviewing the rules. A discussion ensued of what other organizations might be commenting on the rules and whether ILC might coordinate with those groups such as the ABA and the Commercial Law League. Mary Jo Wiggins agreed to contact the chair of the Rules Committee to see who else is working on comments. She also agreed to contact the Litigation Committee to see if they are working on comments.

(iii) Possible amendments re attorney liability; other clean-up Legislation; not expect any activity until January 2006. The Chair reported that a few bills have been introduced that he had forwarded to David Meadows to review. Nothing else has been happening on the clean-up legislation. There are two bills, one, Senate Bill 1879, having to do with a revision to 11 U.S.C. § 502(b) providing for reduction of claims to the extent of interest the creditor does not waive as a matter of policy when the debtor participates in a debt management plan and the other relating to relief for victims of natural disasters. The changes to the preference provisions shift the burden of proof to the debtor and there is legislation that would require a \$1250 per person payment to the PBGC when retirement plans are terminated in chapter 11 cases. Peter Califano at Cooper, White & Cooper is writing a comment on this legislation. Some members expressed concern about this legislation also wondering how the PBGC claim would fit in the priority scheme. David will monitor and call Peter to see if we can review his comments and maybe coordinate.

(iv) Identity Theft Legislation affect on BAPCPA; coordination with Financial Institutions and Consumer Protection Services committees. David Meadows reported that under this legislation there may be an impact on § 363 sales in bankruptcy in connection with requirements that companies establish policies pertaining to identity theft and disclosures and requiring that they give notice if there is a breach of the security and take other steps to protect individual's identities. There is a question whether the legislation would apply to § 363 sales with confidential client data. David Meadows intends to continue monitoring the legislation.

e. California Law Revision Commission. The Chair indicated that we will keep monitoring the Commission's agenda and that the Legislative Subcommittee should generally be kept abreast of CLRC projects.

(i) Mechanics' Lien Provision; probable early 2006. The Chair indicated that the Committee is continuing to monitor this project, and that no action is expected until early next year when the CLRC is expected to issue a report.

(ii) Assignments for the Benefit of Creditors; status. Mark Porter had another conversation with David Gould of McDermott, Will & Emory about a report he was appointed by the CLRC to produce concerning California's assignment for the benefit of creditors mechanism. David had been delaying completion of the report until Sherwood Partners v. Lycos was finally decided, but now that the Supreme Court denied cert. on the case, David Gould told Mark that he knew he had to finish the report and hopes to submit it soon. David had reviewed a survey that the Committee previously distributed to its list-serve with a request for information, and David reported that responses on key issues were all over the map. Respondents, however, were almost unanimous on not wanting judicial supervision. Proposals were also made regarding licensing of professionals serving as assignees. Mark again offered the Committee's assistance to David Gould.

(iii) CCP § 697.530 and problems creating judgment liens through recordation upon assets of a foreign corporation in California. The Chair reported that Mark Porter circulated a short comment to the UCC Committee to get their initial reaction to this issue as was decided at the last meeting. Ellen Friedman had a conversation with Harry Sigman from the UCC Committee to see if they wanted to jointly address this issue. She reported that he seemed

interested and said he would raise it at the UCC Committee meeting. If there was interest, he would appoint a Subcommittee to work with ILC. The Committee discussed the matter and, on motion duly made and seconded, the Committee authorized Ellen Friedman to return to Harry Sigman and help set up a joint committee. The following people volunteered to assist: Molly Baier, Doug Kraft, Dan Schechter and Donna Parkinson. The Chair asked that he be kept informed of progress.

f. CCP §§ 708.110 et seq. and other Secret Liens; Education Project with UCC Committee. Mark Porter is following up on the task force on hidden liens. Rob Harris asked if Mark had a revised secret lien list as a possible item to post on the website. Mark agreed to check for a revised list.

g. Model Real Estate Sale Order: Ex-Comm Approval. The Chair sent the Model Real Estate Sale Order on October 27, 2005 to Neil Wertlieb for Ex-Comm to approve. The response came back that ILC does not need approval for forms so we are free to post the Model Order on the website. The Chair agreed to make sure we have the latest version of the Model Order and instructions to post.

h. CCP § 580(d) Protection on Refinance; possible ALP. Rob Harris thanked Mark Porter for contacting Dan Schechter. Dan agreed that a research project regarding the loss of anti-deficiency protection for refinanced home loans is a good project for his students. They may look at the issue in connection with disaster relief although Barry Glaser stated that it is not just an issue connected with disaster relief. Molly Baier, Barry Glaser, Rob Harris and Doug Kraft agreed to assist on this project.

i. Lis Pendens Case; Possible ALP. The Chair indicated that he is in the process of checking to see whether other committees will oppose an ALP clarifying that lis pendens are available only in actions concerning title to real property and not in equitable disputes such as fraudulent transfers of property.

j. Other State and Federal Bills.

(i) HR 4296 preferences. David Meadows reported that there is proposed legislation to modify the venue provision pertaining to preferences, to require suits over a certain dollar amount to be brought where the defendant is located. Someone from the legislative Subcommittee will be monitoring it.

(ii) Email from Larry Doyle re B & P Code change. This e-mail deals with licensing of contractors and requires payment of their debts before they can be licensed. There is an exception for debts “adjudicated in bankruptcy,” which probably should read “discharged in bankruptcy.” The change is already in process. Larry Doyle has asked that the ILC review the proposed language and report any problems. Rob Harris noted that in the BAPCPA there is an exception under §362 for challenging state licenses in connection with domestic support obligations and that it should be noted that domestic support obligations are not discharged in bankruptcy. He questioned whether all domestic support obligations must be paid before a contractor may be licensed and whether §525 prevents state government from discriminating in licensing based on payment of debts. Mary Jo Wiggins also pointed out that the language refers

to “bankruptcy proceeding,” but should refer to “bankruptcy case” as proceedings are adversary proceedings. Bill Sias noted that in his research for erroneous references to the bankruptcy code in California statutes, there is a long list of references to bankruptcy ‘proceedings’ that are probably incorrect. The Chair reported that the deadline for response to Larry Doyle was in the week after the meeting. The Chair asked members to review the language and comment to him as soon as possible. If we need additional time, the Chair will request it. ILC intends to be responsive to Larry Doyle’s request.

k. Uniform Debt Management Services Act. The Chair reported that he was contacted by Professor Arnold Rosenberg about NCCUSL passing a Uniform Debt Management Services Act to regulate credit counseling agencies and debt settlement companies. Members questioned whether this legislation is preempted by BAPCPA. David Meadows reviewed bills vetoed by the California governor. This bill was vetoed because of the pending BAPCPA. The Chair suggested that ILC may still have to deal with the legislation as it is being promoted by NCCUSL. Rob Harris reminded the committee that the BLS has standing a standing Consumer Financial Services Committee. He suggested we contact them and also the Corporations Committee to see if they are interested in a coordinated effort to address this Act. The Chair agreed to contact the other committees. Rob Harris also reported that Congress held hearings on abusive credit counseling agencies and there may be something happening at the federal level as well.

4. Education Subcommittee Report.

a. Winter Section Education Institute January 27–29, 2006, “The New Bankruptcy Act: What Every General Practitioner Should Know.” Liz Berke-Dreyfuss reported that the Committee is set for the program that Rob Harris, Barry Glaser, Michael Cavan and Colin Wied are presenting entitled “The New Bankruptcy Act – What General Practitioners Should Know.” Information for publication was timely submitted and the group is working on the written materials that are due on January 3, 2006. Liz agreed to arrange a conference call to assist in submitting the materials.

b. State Bar 2006 Annual Meeting deadlines. Liz Berke-Dreyfuss reported that for the Monterey Annual meeting on October 6-8, 2006, the Committee will submit a proposal for a program on Chapter 13 by Michael Koch. He is to provide a 25 word description about the program. Other proposed topics include a program on bankruptcy and construction law by Mike Buckley and Maria Pum and healthcare insolvency by Barry Glaser and Bill Sias. Page 54 of the meeting materials has the specifics of the information to be submitted to the Bar for the proposed programs. BLS also has a standing committee on health law, which should be contacted to see if there is a possibility of a joint program. By the next meeting we should have the summaries of the programs and panel members identified for submission to the Bar regarding the Annual Meeting proposals. Other potential topics discussed included a brochure sent by Andy Alper on workouts and company bankruptcies. The idea of a panel on experience under BAPCPA seemed to be premature for an October panel. That panel should probably occur at the 2007 Winter SEI. This year’s SEI panel is promoted on the website and two additional e-Bulletins will go out before the program. Rob Harris reported that cross-over or coordinated panels do receive preference in selection by the Bar.

5. Website

a. Web Updates.

(i) General annual review and update of webpage—Suggestions for streamlining the website were sent to members. Eve asked that members review and comment. The key issue is removing old data from the website. There is a section in the suggestions regarding deletions and duplications. Old minutes for a significant number of ILC meetings are on the website. Eve suggests that we keep only two years of minutes on the website and that we archive the rest. Rob Harris suggested only 12 sets of previous minutes. The Subcommittee's suggestions proposed two years. Rob Harris suggested that the minutes that are not on the website could be kept on a separate private site. There is a link to the interim rules and they're working on links to e-Bulletins. Eve has asked Mike Mullen to make the e-Bulletins word searchable. There are corrections to the roster on the website also. Rob Harris suggested we could make subfolders for old materials and links to them. Eve will also discuss with Susan Orloff whether we can arrange click and buy on the website for prior programs. The updated Model Real Estate Order is on the website and Dan Schechter's recent decision summary for 2004. The information from the Legislative Subcommittee needs to be updated and streamlined. David Meadows has a chart of bills the Subcommittee is watching. Once he has a final complete and updated chart it will go on the website and can be sent with the meeting materials each month. It will be one document with a summary of legislation and current status with links to more information. He still has three bills to add that we discussed today. Rob Harris also suggested we include on the website current ongoing ILC projects. Eve reported there were some links to nowhere but those are part of the Subcommittee's clean-up. Finally, Eve asked if the members want more detailed photos and files on the website. ADR Subcommittee has photos. The consensus of the members present was that we did not want photos. Eve asked that member comments be sent to her by December 14, 2005.

b. E-Bulletins. The Chair stated that the Committee sent five recent e-Bulletins to the constituency. The Committee made e-News regarding its interim rules review project.

c. Solicitation for Constituency List from list of Attendees of CBF Annual Conference. The Chair indicated that he sent Rob Harris the template for soliciting new members for the constituency list from the California Bankruptcy Forum Attendees' List. Rob suggested we elaborate on what the Committee is about. Rob received the first draft of the Ex-Comm version. Eve Karasik will pull the Committee's mission statement off the website to include in the template. The Chair thanked Doug Boven for the initial draft and asked him to add the suggestion about the Committee.

6. Update from Ex-Comm Liaison.

Rob Harris indicated that the Ex-Comm update pertains to website and the Member Services Committee. They have noticed that many websites are out of date. Committees need help on their websites so Ex-Comm voted to hire a professional to update websites with benchmarks for performance and updating the current roster, upcoming programs and so forth. There's a request to come up with more creative ideas like a blog to discuss on-going projects. Hiring a professional should solve the problem about out-dated websites. The Chair asked how soon this will occur and Rob suggested we keep doing what we're doing now to update the Committee's website. Ex-Comm hopes to get it into the budget and hire someone in 2006.

Adjournment.

The meeting then adjourned at approximately 12:20 p.m.

► **The next meeting of the Committee will be held at January 20, 2006, at Procopio, Cory, Hargreaves & Savitch, 530 B Street, 21st Floor, San Diego, California 92101, phone: 619.238.1900, and the host-coordinator is Mary Jo Wiggins.**



Donna Parkinson, Secretary of the Meeting